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No. 80-620

IN THE

Supreme Court of the United States

October Term, 1980

JOHN J. AYOOB, HUGH IORFIDO, ROSS M. KEEFER, LEWIS E. KIRCHNER, JOSEPH LIBERATI, STEPHEN MAHALIC, ARTHUR L. SCHLEMMER, GEORGE L. SCHAFFER, MILTON H. RICHAEL, Individually and as District Magistrates in the County of Beaver and the Successors in Office,

Petitioners,

v.

PATRICIA MORRISON, BLANCHE LOWE, RATCHEL DAWKINS, GEORGE BLACK, and All Others Similarly Situated,

Respondents.

BRIEF OF THE STATES OF DELAWARE, MISSISSIPPI, VERMONT, NEW HAMPSHIRE, NORTH CAROLINA AND IOWA AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RICHARD S. GEBELEIN
Attorney General of Delaware
Counsel of Record

REGINA MULLEN SMALL
State Solicitor
Department of Justice
State of Delaware
820 N. French Street
Wilmington, DE 19801
(302) 571-2520

Attorneys for the Amicus Curiae, the State of Delaware

CLARK C. KINGERY
Deputy Attorney General
Department of Justice
State of Delaware
820 N. French Street
Wilmington, DE 19801

(Names of additional counsel appear on the reverse of this cover)

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

WILLIAM ALLAIN
Office of the Attorney General
State of Mississippi
Carroll Gartin Justice Bldg.
P. O. Box 220
Jackson, Mississippi 39205

M. JEROME DIAMOND
Attorney General
Office of the Attorney General
State of Vermont
Montpelier, Vermont 05602

GREGORY H. SMITH
Acting Attorney General
WILBUR A. GLAHN, III
Deputy Attorney General
Office of the Attorney General
State of New Hampshire
208 State House Annex
Concord, New Hampshire 03301

JAMES WALLACE, JR.
Deputy Attorney General for Legal Affairs
Office of the Attorney General
State of North Carolina
Raleigh, North Carolina 27602

THOMAS J. MILLER
Attorney General
MARK SCHRATZ
Solictor General
Office of the Attorney General
State of Iowa
Hoover State Office Building
Des Moines, Iowa 50319

Attorneys for the Amici Curiae, the States of Mississippi, Vermont, New Hampshire, North Carolina and Iowa.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTERESTS OF THE AMICUS CURIAE	1
SUMMARY OF THE ARGUMENT	3
ARGUMENT	4
I. The Doctrine of Judicial Immunity Bars an Award Against Judges for Attorney's Fees Under 42 U. S. C. § 1988	4
II. The Plaintiffs Were Not Prevailing Parties and Are, Therefore, Not Entitled to an Award of Attorney's Fees	9
III. Plaintiffs Incurred No Compensable Costs Which May Be Awarded Against Public Officers	12
CONCLUSION	16

TABLE OF AUTHORITIES

Cases:	Page
Aspira of New York v. Board of Educ., 65 F. R. D. 541 (S. D. N. Y. 1975)	10
Aware Women Clinic v. City of Cocoa Beach, 629 F. 2d 1146 (5th Cir. 1980)	15
Bagby v. Beal, 606 F. 2d 411 (3rd Cir. 1979)	10
Bauers v. Heisel, 361 F. 2d 581 (3rd Cir. 1966)	5, 6, 7
Bills v. Hodges, 628 F. 2d 844 (4th Cir. 1980)	15
Bradley v. Fisher, 13 Wall. 335 (1872)	4, 6, 7
Chicago Police Officer's Association v. Stover, 624 F. 2d 127 (10th Cir. 1980)	10
Dennis v. Sparks, — U. S. —, 49 U. S. L. W. 4001 (1980)	4, 7
Employees v. Missouri Public Health & Welfare Dept., 411 U. S. 279 (1973)	13
Hughes v. Repko, 578 F. 2d 483 (3rd Cir. 1978)	10
Hutto v. Finney, 437 U. S. 678 (1978)	13
Isbrandtsen Co. v. Johnson, 343 U. S. 779 (1952)	7
Lund v. Affleck, 587 F. 2d 75 (1st Cir. 1978)	15
Maher v. Gagne, — U. S. —, —, 48 U. S. L. W. 4891 (1980)	9
Martinez v. Bethlehem Steel Corp., 78 F. R. D. 125 (E. D. Pa. 1978)	7
Mid-Hudson Legal Services, Inc. v. G & V, Inc., 578 F. 2d 34 (2nd Cir. 1978)	15
Morrison v. Ayoob, 627 F. 2d 669 (3rd Cir. 1980)	8
Paiewonsky v. Paiewonsky, 446 F. 2d 178 (1971)	7
Perez v. Rodriguez Bou, 575 F. 2d 21 (1st Cir. 1978)	15
Pierson v. Ray, 386 U. S. 547 (1967)	4, 5, 8, 9
Rodriguez v. Taylor, 569 F. 2d 1231 (3rd Cir. 1977), cert. denied, 436 U. S. 913 (1978)	14
Ross v. Horn, 598 F. 2d 1312 (3rd Cir. 1979), cert. denied, 48 U. S. L. W. 3846 (1980)	10

TABLE OF AUTHORITIES (Continued)

Cases (Continued): Page

Scheuer v. Rhodes, 416 U. S. 232 (1974) 8
Stump v. Sparkman, 435 U. S. 349 (1978) 4, 5
Supreme Court of Virginia v. Consumers Union of the United States, — U. S. —, 64 L. Ed. 2d 641 (1980) 4
Swietlowich v. County of Bucks, 620 F. 2d 33 (3rd Cir. 1980) 10
Tenney v. Brandhove, 341 U. S. 367 (1951) 5, 6
Torres v. Sachs, 538 F. 2d 10 (2nd Cir. 1976) 15
Wood v. Strickland, 420 U. S. 308 (1975) 8

Statutes:

20 U. S. C. § 1617 10
29 U. S. C. § 621-634 (1970 & Supp. IV, 1974) 14
42 U. S. C. § 1983 .....4, 5, 6, 8, 12
42 U. S. C. § 1988 .....2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 14, 15
U. S. Constitution:
11th Amendment 13, 15
4th Amendment 5

Rules:

Supreme Court Rule 36.4 2

Miscellaneous:

S. Rep. No. 1011, 94th Cong., 2d Sess. 5 10
S. Rep. No. 94-1011, 94th Cong., 2d Sess. 7 (1976) 8, 13

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INTERESTS OF THE AMICI CURIAE

The States of Delaware, Mississippi, Vermont, New Hampshire, North Carolina and Iowa sponsored by their Attorneys General file this brief in support of the issuance

of a Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit pursuant to Supreme Court Rule 36.4. Like each of the sovereign states, the Amici States have a Judicial Branch of government in which the judicial power is vested. The States are interested in maintaining a Judicial Branch capable of administering justice without fear of incurring liability for attorney's fees in actions in which its members are otherwise absolutely immune from suit. Furthermore, the States have an interest in insuring that attorney's fees are awarded pursuant to 42 U. S. C. § 1988 only when the prevailing party has or would have incurred such expenses and where the action on which he prevailed has a direct causal link to the relief which he obtained.

SUMMARY OF ARGUMENT

The common law doctrine of absolute judicial immunity bars the award of attorney's fees under 42 U. S. C. § 1988 against judicial officers acting in their judicial capacity. The Constitutional guarantee to the states of a "republican form of government" requires the maintenance of a "free and independent" judiciary unfettered by threats of collateral attacks and monetary liability for actions within the sphere of their official duties. Without reaching the constitutional issue, however, it is clear that the Court of Appeals incorrectly concluded that there was clear and express evidence of congressional intent to waive judicial immunity.

The Court of Appeals erred in concluding that plaintiffs had "essentially succeeded" on their claims where there was no showing that their conduct played a significant role in obtaining the result which they sought. The "material factor" test adopted by the Court of Appeals as applied here would foreclose any exercise of discretion conferred on the District Court by the statute to award attorney's fees where appropriate.

Finally, even prevailing parties are not entitled to an award of attorney's fees when they incur no such costs. No important right would be vindicated by such a result and it would in fact skew the enforcement of the civil rights laws.

ARGUMENT

I. The Doctrine of Judicial Immunity Bars an Award Against Judges for Attorney's Fees Under 42 U. S. C. § 1988.

This Court has repeatedly concluded that judicial officers have complete and absolute immunity for the performance of their judicial duties. *Bradley v. Fisher,* 13 Wall. 335 (1872); *Dennis v. Sparks,* — U. S. —, 49 U. S. L. W. 4001 (1980); *Pierson v. Ray,* 386 U. S. 547 (1967); *Stump v. Sparkman,* 435 U. S. 349 (1978); *Supreme Court of Virginia v. Consumers Union of the United States,* — U. S. —, 64 L. Ed. 2d 641 (1980). In *Stump v. Sparkman, supra,* this Court recently rearticulated the compelling basis for judicial immunity:

> The governing principle of law is well established and is not questioned by the parties. As early as 1872, the Court recognized that it was "a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, [should] be free to act upon his own convictions, without apprehension of personal consequences to himself." *Bradley v. Fisher,* [13 Wall. 335 (1872)], at 347. For that reason the Court held that "judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." 13 Wall., at 351. Later we held that this doctrine of judicial immunity was applicable to suits under § 1 of the Civil Rights Act of 1871, 42 U. S. C. § 1983, for the

> legislative record gave no indication that Congress intended to abolish this long-established principle. *Pierson v. Ray*, 386 U. S. 547 (1967).

Stump v. Sparkman, 435 U. S., at 355-356.

This absolute judicial immunity from suit, analogous to that of the coordinate legislative branch of government *Tenney v. Brandhove*, 341 U. S. 367 (1951), has its roots in logic, rationality, and practicality. For a judiciary whose decisions in administering justice are subject to attack in collateral preceedings can be neither free nor independent. In such circumstances, the administration of justice, regrettably, will be tainted by an all-too-human concern for culpability in decision making. The litigants and the public, both of whom rely on the integrity and independence of the judiciary, would be ill-served by even the mere possibility of such an outside influence weighing on the process.

In the case before the Court, the Third Circuit ignored its own prior teachings on the issue of the constitutionality of subjecting judicial officers to liability for suit under the Civil Rights Act. In *Bauers v. Heisel*, 361 F. 2nd 581 (3rd. Cir. 1966), the *en banc* Court concluded that Article 4, ∫ 4 of the United States Constitution, which guarantees to each of the States a Republican Form of Government, presented a constitutional impediment to finding a waiver of judicial immunity in the Civil Rights Act of 1871. In *Bauers* the Third Circuit squarely concluded that:

> The framers of the Constitution clearly evidenced their belief that a separate and independent judiciary is an indispensable element of a republican form of government. See The Federalist, pp. 236, 303-305, 488 *et. seq.*, 494 *et seq.* We believe that the abro-

> gation of judicial immunity by Congress would destroy the independence of the judiciary of the various States, and consequently deprive them of a republican form of government. The language of the Supreme Court in *Bradley v. Fisher,* 80 U. S. (13 Wall.) 335, 347, 20 L. Ed. 646, lends support to our conclusion.
>
> ". . . [I]t is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to everyone who might feel himself aggrieved by the action of a judge, would be inconsistent with the possession of this freedom, and *would destroy that independence without which no judiciary can be either respectable or useful.*"

Bauers v. Heisel, 361 F. 2d, at 588-589 (emphasis in the original).

If a predicate for liability for attorney's fees under § 1988 is amenability to suit under § 1983 then the logic of the Third Circuit's *en banc* decision on the constitutional issue in *Bauers* requires the conclusion that there is no liability for fees because there is no exposure to suit on the underlying facts.[1]

However, this Court need not reach the constitutional issue because it is patent that, contrary to the as-

1. We concur in Petitioners' argument that the application of the principles of *Tennoy v. Brandhove,* 341 U. S. 367 (1951) requires that judicial as well as legislative officers are immune from suit not merely from liability in money damages. Petition for Writ of Certiorari, pp. 37-38 fn. 13. We also agree that even if immunity extends only to liability from damages, the rationale for such immunity would be severely eroded by awarding fees against the judicial officer. *Id.* at 39.

sertion of the Court of Appeals, there is no clear or express evidence of an intention on the part of the Congress to abolish the doctrine of absolute judicial immunity. That the historical foundation for judicial immunity rests in the common law has been recognized by this Court and indeed by the Court of Appeals for the Third Circuit. *See Bradley v. Fisher,* 13 Wall. 335, 347-354 (1872); *Dennis v. Sparks,* — U. S. —, 49 U. S. L. W. 4001, 4002 (1980); *Bauers v. Heisel,* 361 F. 2d 581, 587 (1966).

For the Congress to enact legislation in derogation of such common law immunities, it must make its statutory purpose evident. *Isbrandtsen Co. v. Johnson,* 343 U. S. 779, 783 (1952); *see also Bauers v. Heisel,* 361 F. 2d 581, 587 (1966); *Paiewonsky v. Paiewonsky,* 446 F. 2d. 178, 180-181 (1971); *Martinez v. Bethlehem Steel Corp.,* 78 F. R. D. 125, 129 (E. D. Pa. 1978).

The indication of intent to waive the common law doctrine of judicial immunity ascribed to the Congress by the Court of Appeals is far from clear and is more correctly characterized as very ambiguous. According to the Court of Appeals:

> The legislative history of section 1988 indicates that Congress expressly considered judicial immunity and decided to abrogate it under section 1988. The House Report states:
>
> > Furthermore, while damages are theoretically available under statutes covered by [§ 1988], it should be observed that, in some cases, the immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy.[17] Consequently awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if Federal civil and constitutional rights are to be adequately protected.
>
> H. Rep. No. 94-1558, 94th Cong., 2nd Sess. 9 (1976).

> Footnote 17 contains a citation to *Pierson v. Ray,* 386 U. S. 547 (1967), the case where the Supreme Court indicated that Congress could abrogate judicial immunity. See generally *Supreme Court of Virginia v. Consumers Union,* 100 S. Ct. 1967, 1977-78 (1980). *We believe that this is sufficient indication that the Congress has exercised the choice left to it by Pierson by enacting § 1988.*

Morrison v. Ayoob, 627 F. 2nd 669 (3rd. Cir. 1980), Appendix to Petition for Writ of Certiorari, at 6b-7b. We respectfully submit that the footnote reference found dispositive by the Court of Appeals does not provide sufficient indication that the Congress intended to abrogate judicial immunity.[2]

The entire footnote number seventeen in the House Report consists of citations to the cases: *Wood v. Strickland,* 420 U. S. 308 (1975); *Scheuer v. Rhodes,* 416 U. S. 232 (1974); and *Pierson v. Ray,* 386 U. S. 547 (1967). *Wood* and *Scheuer* articulate standards for the concept of official immunity. *Pierson,* while reaffirming the immunity of a judicial officer from suit under § 1983, also recounted the special defenses of good faith and probable cause to arrest available to law enforcement officers in § 1983 actions. As *Pierson* is the only case cited in the footnote which deals with the doctrine of special defenses, we respectfully suggest that it was included in the footnote as illustrating a case where "special defenses" referred to in the body of the Report exists rather than for its holding on judicial immunity. However, there is no

2. It is noteworthy that the Senate rather than the House version of the bill was enacted. The Senate Report makes it quite clear that no change in existing judicial immunity was contemplated. S. Rep. No. 94-1011, 94th Cong., 2d Sess. 7 (1976).

basis for concluding that the footnote constitutes an indication of congressional intent to abrogate the common law doctrine of absolute judicial immunity.

We find it difficult to believe that the Congress would be so cavalier in disposing of judicial immunity in the face of the long standing and clearly articulated reasons for such immunity. As *Pierson* itself teaches:

> The immunity of judges for acts within the judicial role is equally well established [as that of legislators acting within the legislative role], and we presume that Congress would have specifically so provided had it wished to abolish the doctrine.

Pierson v. Ray, 386 U. S. at 555. We respectfully suggest that the Court of Appeals was in error in relying on the above quoted section of the House Report and that the immunity of the judiciary remains absolute.

Because of the significance of this question to the continued functioning of the Judicial Branch we respectfully request this court to grant it plenary consideration.

II. The Plaintiffs Were Not Prevailing Parties and Are Therefore Not Entitled to an Award of Attorney's Fees.

Section 1988 permits the award of reasonable attorney's fees to the "prevailing party" as part of the costs. This Court has held that the availability of fees is not conditioned "on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated"—a plaintiff who prevails "through settlement rather than through litigation" may be awarded fees, *Maher v. Gagne*, — U. S. —, —, 48 U. S. L. W. 4891, 4893, (1980). This is consistent with the legislative history of section 1988:

> For purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through consent judgment or without formally obtaining relief.

S. Rep. No. 1011, 94th Cong., 2d Sess. 5, reprinted in (1976) U. S. Code Cong. & Admin. News, pp. 5908, 5912.

In order for a party to be a "prevailing party" within the meaning of section 1988, the Court of Appeals has required a showing of "essential success" on the claims. *Hughes v. Repko*, 578 F. 2d 483, 487 (3rd Cir. 1978). *See also Switlowich v. County of Bucks*, 620 F. 2d 33 (3d Cir. 1980); *Bagby v. Beal*, 606 F. 2d 411 (3rd Cir. 1979). However, before plaintiffs can be said to have "vindicated their rights" or to have "essentially succeeded" on their claims, their conduct must be shown to have played a significant role in achieving their objectives. *Aspira of New York, Inc. v. Board of Educ.*, 65 F. R. D. 541 (S. D. N. Y. 1975), cited with approval in the legislative history quoted above.[3] *Chicago Police Officer's Association v. Stover*, 624 F. 2d 127 (10th Cir. 1980); *Ross v. Horn*, 598 F. 2d 1312, 1322 (3rd Cir. 1979), cert. denied, 48 U. S. L. W. 3846 (1980). As a practical matter, actions taken by a "prevailing party" to vindicate civil rights must be so closely connected with the result and be of such significance as to justify the Court in awarding attorney's fees.

As indicated by the Court of Appeals, "the only evidence of record" as to causation in this case was provided

3. The Court in *Aspiria, supra* awarded attorney's fees under the Emergency School Aid Act, 20 *U. S. C.* § 1617, to plaintiffs after a consent decree had been entered. Plaintiffs were found by the Court to have prevailed, because "the 'compliance' achieved in this case would not have happened, certainly not as early or as thoroughly as it has, without the initial and continued impact of plaintiffs' action." 65 F .R. D. at 544.

by plaintiffs' counsel, "who testified that he had investigated the matter and found violations before the action was filed but few after." Counsel for plaintiffs further testified that he communicated with some of the defendants informally prior to filing of this suit. After the action was filed, counsel for both sides met and discussed the case. The Court of Appeals determined that this sequence of events "strongly suggests that the action was a material factor in bringing about the defendants' change in conduct." Accordingly, the Court of Appeals declined to hold that the district court was clearly erroneous in finding plaintiffs to be prevailing parties.

We submit that a determination of causation based on a "material factor" test, such as employed by the Court of Appeals in this case, is insufficient to establish prevailing party status for purposes of section 1988. As a matter of proof, a "prevailing party" must, of course, introduce evidence that it is more likely than not that his actions constitute a material element and substantial factor in effectuating a resolution of the dispute in his favor. However, the analysis of causation cannot logically rest without a conclusion being drawn as to whether the action taken by the party seeking attorney's fees is so significant and important a cause that the other party, in all fairness, should be legally responsible to pay. That this second factor is anticipated under section 1988 is evident in the language therein relating to the Court's discretion. Under the approach adopted by the Court of Appeals, however, the trial court is effectively foreclosed from exercising discretion to refuse to award fees once it is evident that the plaintiff's efforts are a *sine qua non* of the relief requested. Although such efforts may be a necessary antecedent in any final resolution of the matter, it does not stand to reason that the burden of attorney's fees should be shifted to an adverse party (the State) without a de-

termination by the Court that the connection between the defendant's duty to avoid violation of civil rights and the consequences which flow from breach of such responsibility is sufficient to warrant the imposition of a monetary assessment.

We respectfully submit that the Court of Appeals was mistaken when it ruled that the record supports the finding by the district court that plaintiffs have prevailed within the meaning of section 1988. The record reflects no more of probative value than that the action requested in the complaint actually transpired after the complaint was filed. Even if it is assumed that this would not have occurred as it did without the impetus of plaintiff's lawsuit, the Court below erred in awarding fees without first determining, on the record, that the plaintiffs' actions were both closely related to the result requested; and, were of such significance as to justify an award of attorney's fees.

Because attorney's fees may only be awarded to a "prevailing party" under section 1988, the proper determination as to who may constitute a prevailing party is particularly important. Since the lower courts have not provided a careful and comprehensive standard based on burden of proof and causation, a clarifying decision by this Court is requested.

III. Plaintiff Incurred No Compensable Costs Which May Be Awarded Against Public Officers.

The Civil Rights Attorney's Fees Awards Act of 1976 amended 42 *U. S. C.* § 1988 to provide in relevant part:

> In any action or proceeding to enforce a provision of section . . . 1983 . . . of this title . . . the Court, *in its discretion*, may allow the prevailing party, other than the United States, a reasonable attorney's fee *as part of the costs*. (Emphasis supplied).

In providing that, "as part of the costs," attorney's fees may be awarded to the prevailing party, the plain language of the Act reveals that Congress meant to indemnify the successful party against the expense of asserting fundamental rights. That purpose is evident in the legislative history of the Act:

> In many cases arising under our civil rights laws, the citizen who must sue to enforce the laws has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to *recover what it costs them to* vindicate these rights in Court. Senate Report No. 94-1011, 94th Cong., 2d Sess., 1976 U. S. Code Cong. & Admin. News 5908, 5910 (emphasis supplied).

This Court in *Hutto v. Finney*, 437 U. S. 678 (1978), ruled that the Eleventh Amendment does not bar attorney's fee awards in federal courts because such awards are part of the costs—which "have traditionally been awarded without regard for the State's Eleventh Amendment immunity." *Id.*, at 695. The Court was careful to add, however, that a formal indication of congressional intent to abrogate the State's Eleventh Amendment immunity would be required if the concept of costs were to be expanded "beyond the traditional category of litigation expenses" *Id.*, at 697 fn. 27. Otherwise, the States could be exposed to "enormous financial burdens" without careful thought. *Employees v. Missouri Public Health & Welfare Dept.*, 411 U. S. 279, 284 (1973). An award of costs has traditionally been limited to "compensating a successful litigant for the expense of his suit," *Hutto, supra* at 697, fn. 27.

The plaintiffs in this action are represented by Neighborhood Legal Services—a public interest law firm which

receives all of its funding from the Commonwealth of Pennsylvania and the federal government. Plaintiffs have neither been charged, nor have they paid, any attorney's fees. Nevertheless, the Court of Appeals held that a fee award is proper, relying on its decision in *Rodriguez v. Taylor*, 569 F. 2d 1231 (3rd Cir. 1977), *cert. denied*, 436 U. S. 913 (1978).

In *Rodriguez*, the City of Philadelphia was found to have discriminated against an aspiring security guard on the basis of his age in violation of the Age Discrimination in Employment Act of 1967, 29 *U. S. C.* §§ 621-634 (1970 & Supp. IV, 1974) (ADEA). Plaintiff's legal counsel, Community Legal Services, Inc. was awarded attorney's fees under 29 *U. S. C.* § 626(b) and 29 *U. S. C.* § 216(b), which provide:

> "The court . . . *shall*, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant." (Emphasis supplied).

The *Rodriguez* court held that publicly funded legal services organizations were not barred from receiving mandatory attorney's fee awards under ADEA. The Court reasoned that statutorily authorized awards are "designed to encourage private enforcement of individual rights and deter socially harmful conduct." *Rodriguez, supra* at 1245. Neither objective is apposite here since an award is unnecessary to any vindication of plaintiffs' civil rights and the conduct sought to be deterred has been discontinued.

By applying the mandatory standard for awarding fees set under ADEA to 42 *U. S. C.* § 1988, the Court of Appeals decision severely restricts the broad discretion afforded to the trial court under section 1988. The ruling operates to make it an abuse of discretion for the trial

court to deny an award of attorney's fees on the basis that no attorney's fees were incurred—an inherently absurd result. Since attorney's fees may not be awarded under § 1988 except as part of the costs actually incurred by the successful litigant, the trial court should not be placed in the position of committing error by considering whether the prevailing party is obligated to pay attorney's fees.

More importantly, the Court of Appeals has joined the ranks of several other federal courts which have approved awards of attorney's fees to publicly funded legal service organizations for successful representation of civil rights litigants against governmental entities, as an incentive to pursue further civil rights enforcement litigation.[4] We submit that to award attorney's fees for this purpose—rather than as reimbursement for expenses borne by the prevailing party in vindicating fundamental rights—expands the concept of costs far beyond "traditional litigation expenses" and exposes the States to enormous financial burden. Since express statutory authorization to award attorney's fees where none have been incurred does not exist, a major new intrusion into state sovereignty has been created, resulting in a significant erosion of the immunity conferred by the Eleventh Amendment.

Because the Court of Appeals has vastly expanded the traditional concept of costs through misplaced reliance on a decision construing a differently worded statute in a way which, we submit, distorts the purpose of section 1988 and violates the Eleventh Amendment, we invite this Court to address the issue.

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4. See, for example: *Lund v. Affleck*, 587 F. 2d 75 (1st Cir. 1978); *Mid-Hudson Legal Services, Inc. v. G & V, Inc.*, 578 F. 2d 34 (2nd Cir. 1978); *Perez v. Rodriguez Bou*, 575 F. 2d 21 (1st Cir. 1978); *Torres v. Sachs*, 538 F. 2d 10 (2nd Cir. 1976); *Aware Woman Clinic v. City of Cocoa Beach*, 629 F. 2d 1146 (5th Cir. 1980); *Bills v. Hodges*, 628 F. 2d 844 (4th Cir. 1980).

CONCLUSION

This case presents questions of fundamental importance to the maintenance of the independence of the Judicial Branch of government and the bases for state liability for attorney's fees. This Court should issue a writ of certiorari to review the judgment and opinion of the Court of Appeals for the Third Circuit.

Respectfully submitted,

RICHARD S. GEBELEIN
Attorney General of the
State of Delaware

REGINA MULLEN SMALL
State Solicitor
Department of Justice
State of Delaware
820 N. French Street
Wilmington, DE 19801
(302) 571-2520

Attorneys for the Amicus Curiae, the State of Delaware

On the Brief:

CLARK C. KINGERY
Deputy Attorney General
Department of Justice
State of Delaware
820 N. French Street
Wilmington, Delaware
19801

DATED: 9 December 1980

WILLIAM ALLAIN
Attorney General
Office of the Attorney General
State of Mississippi
Carroll Gartin Justice Bldg.
P. O. Box 220
Jackson, Mississippi 39205

M. JEROME DIAMOND
Attorney General
Office of the Attorney General
State of Vermont
Montpelier, Vermont 05602

GREGORY H. SMITH
Acting Attorney General
WILBUR A. GLAHN, III
Deputy Attorney General
Office of the Attorney General
State of New Hampshire
208 State House Annex
Concord, New Hampshire 03301

JAMES WALLACE, JR.
Deputy Attorney General for Legal Affairs
Office of the Attorney General
State of North Carolina
Raleigh, North Carolina 27602

THOMAS J. MILLER
Attorney General
MARK SCHRATZ
Solictor General
Office of the Attorney General
State of Iowa
Hoover State Office Building
Des Moines, Iowa 50319

Attorneys for the Amici Curiae, the States of Mississippi, Vermont, New Hampshire, North Carolina and Iowa.